# FAMILY MEDICAL LEAVE FOR GRANDPARENT CONTESTED

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The Family and Medical Leave Act (29 U.S.C. 2601, et seq.) requires employers with 50 or more employees to grant their employees up to a total of 12 workweeks of unpaid leave during any 12-month period for medical emergencies, including the need to care for an immediate family member (spouse, child, or parent) with a serious health condition. To be eligible, an employee must have been employed by the employer for at least 12 months. The FMLA and implementing regulations (29 CFR Part 825) are administered by the U.S. Department of Labor, Employment Standards Administration. (See: http://www.dol.gov/esa/whd/fmla/)

In the case of *Dillon v. Maryland-National Capital Park and Planning Commission*, 382 F. Supp. 2d 777 (Dist. Md. 2005), plaintiff Cynthia Dillon claimed that she was denied her rights under the federal Family and Medical Leave Act (FMLA) when defendant Maryland-National Capital Park and Planning Commission (MNCPPC) terminated her employment for being "AWOL [absent without leave] for the very time period that Dillon was seeking FMLA leave." At the time of her termination, Dillon was employed as an administrative aid in the payroll section of MNCPPC's finance department. Dillon claimed she was "entitled to leave under the FMLA in order to take care of her ailing grandmother," whom she said "basically raised her as a child."

In response, MNCPPC argued that Dillon's grandmother did not qualify as a "parent" under the FMLA. In addition, MNCPPC claimed Dillon failed to provide adequate notice of her need for FMLA leave. Moreover, MNCPPC maintained that "Dillon's request was not made "in order to care for" her grandmother's serious health condition."

## FACTS

In August 2002, Dillon had requested three weeks leave, to be taken from December 12, 2002 through January 2, 2003, in order to take a family vacation with her husband and children to Jamaica, where several of Dillon's relatives lived. Dillon admitted that she purchased the airline tickets before she submitted her request for leave, and, thus, before her request had been approved.

In response to Dillon's request, her second-level supervisor informed her that a leave of three weeks during that time of the year would not be possible. On November 6, 2002, Dillon submitted a second request for three weeks leave for the same time period. In response to her second request, Dillon's third-level supervisor again informed Dillon that her leave request for three weeks in December/January could not be approved due to the nature of the payroll department's work program at that time of the year. In the alternative, Dillon was told a leave request for December 12 through December 20, 2002 would be recommended for approval.

In addition to the fact that she would incur a penalty if she changed her airline tickets, Dillon claimed it was important to have her leave request approved because her grandmother was "not in the best of health and is asking for me." In a meeting with the head of the MNCPPC finance

department, Dillon reiterated her reasons for requesting three weeks leave, including that "her family had already planned a Christmastime vacation in Jamaica, that they had already purchased airline tickets, that she would incur a penalty if she altered her flight itinerary, and that she wanted to visit her grandmother."

According to the finance head, Dillon stated that she would be taking the requested three weeks leave regardless of whether MNCPPC approved it. During this meeting, Dillon recalled telling the finance director that her grandmother, who had raised her as a child, was "very ill" and she "needed to spend some time devoted to taking care of her."

Dillon subsequently accepted MNCPPC's offer of an earlier and shorter period of leave than her request, i.e., December 12 through December 20, 2002. At that time, Dillon was told that "she would be absent without approved leave (AWOL) and would face termination" if she stayed beyond the period approved.

On December 12, 2002, as scheduled, Dillon and her family flew to Jamaica. Upon arriving, Dillon immediately visited her grandmother, who lived with Dillon's aunt. That same day, Dillon learned that her grandmother had sustained a "small stroke" a few days earlier. Moreover, upon seeing her grandmother's living conditions, which Dillon described as "dilapidated," she decided it was necessary for her to secure another living arrangement.

Seven days after first arriving in Jamaica, Dillon sent an e-mail to the finance director "requesting an extension of sick leave because my grandma is very ill and I am in the process of finding a home for her." In her response, "due to work program demands," the finance director denied Dillon's request for an extension and reiterated her warning that she would be terminated if she exceeded the time period approved for her leave.

After the approved leave period, Dillon failed to return to work. Instead, Dillon sent the finance director another e mail reiterating her ongoing concerns about the health and living conditions of her grandmother who had raised her as a child. In addition, Dillon asked the finance director to "check to see if MNCPPC's Merit Rules would cover an extension of time to take care of her grandmother."

The finance director informed Dillon that she believed the merit rules provided for "sick leave up to 80 hours for immediate family described as a spouse, a child or parents." Assuming she could prove her grandmother had raised her, Dillon was also told to contact the personnel office to determine whether this rule would apply to Dillon's grandmother. While indicating that she would "consider any information" Dillon could provide before making an ultimate decision, the finance director informed Dillon that "her status remained AWOL" and "Merit Rules provide for termination if the abandonment continued for a period of three days."

Dillon returned from Jamaica on December 31, 2002. On January 3, 2003, the finance director sent a letter to Dillon at her home, both by courier and first-class mail, notifying her of MNCPPC's intent to terminate her employment. In this five-page letter, the finance director explained MNCPPC's decision was based on Dillon's absence from work well beyond the approved leave time. For the first time, FMLA rights were explicitly mentioned in this

termination letter informing Dillon that she had five days to respond if she was claiming her absence was covered under FMLA on the basis that her "grandmother actually stood in the role of your parent during childhood."

In her response, Dillon provided details of her close relationship with her grandmother, repeating her feeling a "sense of duty to help her grandmother" because she had played a major role in her upbringing. Despite Dillon's description of her relationship with her grandmother, the finance director found Dillon's request did not qualify her for extended leave under the FMLA. In so doing, the finance director stated that "the FMLA normally does not apply with respect to leave occasioned by a grandparent's health problem," unless "a grandparent is recognized legally as the employee's parent."

Accordingly, on January 17, 2003, Dillon received a "Final Dismissal Letter" informing her of MNCPPC's decision to terminate her employment. At the time, MNCPPC had already received information from the physician treating Dillon's grandmother, including a completed MNCPPC FMLA Medical Certification form. In the opinion of the treating physician, Dillon's grandmother required assistance for basic medical and personal needs after suffering a small stroke.

Dillon's subsequent appeals of her termination were denied by MNCPPC's merit board.

IN LOCO PARENTIS

The specific issue before the federal district court was, therefore, whether Dillon's grandmother qualified as her "parent" under the FMLA. As cited by the court, the FMLA provides employees with the right "to take up to twelve weeks of unpaid leave in any one-year period in order to care for a parent who has a serious health condition." 29 U.S.C. § 2612(a)(1)(C). Moreover, the FMLA prohibited any discrimination or retaliation for "exercising substantive FMLA rights or for otherwise opposing any practice made unlawful by the Act."

As noted by the court, the FMLA defines "parent" as "the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter." 29 U.S.C. § 2611(7). In so doing, the court acknowledged that "the statute does not define the term 'in loco parentis'," On the other hand, the court found relevant federal labor department regulations defined the term as persons who have "day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child." Further, a biological or legal relationship was not necessary to establish in loco parentis status. Since "the plain language of the FMLA does not authorize FMLA leave for the care of grandparents," the federal district court found Dillon had to demonstrate that her grandmother stood in loco parentis under the FMLA.

As characterized by the court, the legislative intent of the FMLA was to "balance the demands of the workplace with the needs of families and to promote national interests in preserving family integrity." 29 U.S.C. § 2601(b)(1). In this particular instance, the federal district court found Dillon had produced sufficient evidence before and after MNCPPC's decision which effectively

raised the question for a jury trial to determine the existence of the required in loco parentis relationship under the FMLA.

> The term in loco parentis, according to its generally accepted common law meaning, refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties…
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> Not only had Dillon informed MNCPPC that her grandmother had "raised" her as a child, but she had also informed it that her grandmother "fed" her and that she slept with her, indicating that Dillon indeed resided with her grandmother during her childhood and that her grandmother provided certain necessities for her.

Further, the court found that in loco parentis status for Dillon's grandmother was not necessarily precluded by the fact that Dillon's mother was also present in her childhood home. According to the court, it was still "possible that her grandmother also stood 'in loco parentis' at least for some portion of Dillon's childhood" since the FMLA did not put a "minimum time requirement on the status."

SERIOUS HEALTH CONDITION

While the FMLA "entitles certain eligible employees 12 workweeks of leave in order to care for a parent who has a serious health condition," the federal district court noted that an employer may require a request for FMLA leave to be "supported by a certification issued by the health care provider of the parent." 29 U.S.C. § 2613(a). As described by the court, the "certification is sufficient" if it provides the following information:

> the date on which the serious health condition commenced, the probable duration of the condition, the appropriate medical facts within the knowledge of the health care provider regarding the condition, and a statement that the eligible employee is needed to care for the parent and an estimate of the amount of time that such employee is needed.

In addition, the court cited relevant federal regulations from the labor department which further defined the "needed to care for" term to include "both physical and psychological care" of a family member who is "unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor" due to a serious health condition. Moreover, such care would also include "psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care." Within this regulatory context, needed care would also include "situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home." 29 C.F.R. § 825.116(a)-(b)

In this particular case, MNCPPC argued that Dillon had failed to put forth sufficient evidence that "her grandmother's alleged serious health condition was the reason she requested an extension of leave." Specifically, MNCPPC contended that "the purported purpose of the extended leave was, at most, to obtain better living accommodations for her grandmother, which, while laudable, is not a sufficient basis for leave under the FMLA." The federal district court rejected this argument.

Applying the above cited definitions of "needed care," the federal district court found the health certificate provided by Dillon stated all the information explicitly required by the FMLA, in particular the treating physician's statement that Dillon would "need to look after" her grandmother and "find a caregiver." In the opinion of the court, the certificate and physician statement provided enough evidence to suggest that "Dillon's request for a leave extension was in fact 'in order to care for' her grandmother whom she asserts, and the medical certificate confirms, had a 'serious health condition'."

TIMELY NOTICE

Under the circumstances of this case, MNCPPC also contended that Dillon could not claim any FMLA rights because her "request for leave under the FMLA was not timely."

As cited by the federal district court, the FMLA requires employees to notify their employers of the need for foreseeable leave, but "the act itself does not contain a notice requirement for unforeseeable leave." 29 U.S.C. § 2612 (e)(1) Rather, regulations required that notice be given to the employer "as soon as practicable" when "the approximate timing of the need for leave is unforeseeable." 29 C.F.R. § 825.303(a). Further, except in extraordinary circumstances, the expectation is that the employee "will give notice to the employer within no more than one or two working days of learning of the need for leave."

According to the court, the required notice need not include an expressed assertion of "rights under the FMLA or even mention the FMLA, but may only state that leave is needed." As characterized by the court, "[t]he critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for an FMLA-qualifying need."

Applying these principles to the facts of the case, the court found Dillon "had put forth sufficient evidence to create a genuine issue as to whether she timely imparted enough information to MNCPPC to reasonably apprise it of her request for additional time off to take care of her ailing grandmother." In particular, the court noted that Dillon "informed MNCPPC that her grandmother was in worse medical condition than she had first anticipated, and that she had actually raised her." After being informed of the situation, the court found MNCPPC, on its own initiative, had informed Dillon that her request for leave might qualify under the FMLA.

Accordingly, the federal district court found evidence that Dillon had "imparted to MNCPPC information sufficient to reasonably apprise it of the employee's request to take time off for an FMLA-qualifying need." The federal district court, therefore, rejected "MNCPPC's contention that Dillon did not timely assert her FMLA rights." On the other hand, the court found evidence

that MNCPPC had "acted in good faith and had reasonable grounds for believing that the FMLA did not apply" to Dillon's absences. Having found sufficient evidence to support Dillon's FMLA claim, the federal district court issued an order allowing the case to proceed to trial.

At trial, the jury returned a verdict for Dillon, finding Dillon had proved by a preponderance of the evidence that MNCPPC unlawfully interfered with the exercise of a protected right under the FMLA by denying her requested leave. In October 2006, a federal magistrate denied MNCPPC's motions for a judgment in its favor or a new trial. Ultimately, Dillon was awarded $51,237.15 in back pay and interest, as well as costs and attorney fees of $60,500. On December 11, 2007, the United States Court of Appeals for the Fourth Circuit affirmed this judgment. On June 18, 2008, the Supreme Court of the United States refused to grant review of this decision.